No. —

In the Supreme Court of the United States

OCTOBER TERM, 1940

THE FEDERAL LAND BANK OF ST. PAUL, PETITIONER

v.

BISMARCK LUMBER COMPANY, A CORPORATION, AND OWEN T. OWEN, AS TAX COMMISSIONER OF THE STATE OF NORTH DAKOTA

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA AND MOTION TO SUBSTITUTE

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The Solicitor General, on behalf of The Federal Land Bank of St. Paul, prays that a writ of certiorari issue to review the judgment of the Supreme Court of North Dakota entered in the above case on March 17, 1941, affirming the judgment of the District Court of Burleigh County, North Dakota.

OPINIONS BELOW

The District Court wrote no opinion. The opinion of the Supreme Court of North Dakota (R. 22) is reported in 297 N. W. 42.

JURISDICTIONAL STATEMENT

The judgment of the Supreme Court of North Dakota sought to be reviewed was entered on March 17, 1941 (R. 20). The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925, on the ground that the decision below denies a right and an immunity claimed by the petitioner under the Constitution and statutes of the United States.

The issue in this case is whether the Federal Land Bank of St. Paul, as a federal instrumentality, is liable in the purchase of lumber for the tax imposed by the Sales Tax Act of North Dakota upon the sale of personal property. The denial of its claim for immunity by the state courts plainly presents a federal question reviewable under Section 237 (b) of the Judicial Code. *Federal Land Bank* v. *Priddy*, 295 U. S. 229; *Pittman* v. *Home Owners' Corp.*, 308 U. S. 21.

The federal questions were specially set up and claimed by petitioner in its complaint filed in the District Court (R. 6, 8–9), in its specification of errors in the Supreme Court of North Dakota (R. 17–18), and were briefed and argued before that court. The grounds upon which it is contended that the questions are substantial are set forth in the Reasons for Granting the Writ, *infra*.

QUESTION PRESENTED

Whether the petitioner is subject to the Sales Tax Act of North Dakota.

STATUTES INVOLVED

The relevant provisions of the Federal Farm Loan Act (c. 245, 39 Stat. 360; 12 U. S. C. Secs. 641 *et seq.*) and of the Sales Tax Act of North Dakota (Laws 1937, c. 249) are reprinted in the Appendix.

STATEMENT

The petitioner, created under the Federal Farm Loan Act of July 17, 1916,[1] acquired three farm properties in Burleigh County, North Dakota, in the course of its farm mortgage lending business (R. 3). It was necessary for petitioner to purchase materials in order to repair and improve the buildings and fences located on these properties (R. 3). For this purpose it purchased lumber and other building materials, of an aggregate value of $408.26 from the Bismarck Lumber Company. The Lumber Company demanded a total of $8.02 from the petitioner, representing the amount of the state sales tax, which the petitioner refused to pay (R. 4–6).

The petitioner on March 9, 1938 filed a complaint in the District Court of Burleigh County against the Lumber Company and the Tax Commissioner

[1] On December 31, 1939, the Federal Land Bank of St. Paul had $55,501,940 of capital stock outstanding, of which 71.3 per cent was owned by the federal Government. *1939 Annual Report of the Farm Credit Administration*, p. 154.

of the State of North Dakota[2] (R. 2–10). It alleged the foregoing facts and prayed that the court adjudge that the petitioner is not liable for the sales tax (R. 9), because it is exempt under Section 26 of the Federal Farm Loan Act and the federal Constitution (R. 8–9). The respondents demurred, on the ground that the complaint did not state facts sufficient to constitute a cause of action (R. 11).

The court on May 6, 1938 sustained the demurrer (R. 12) and entered judgment against the petitioner in the amount of $8.02 (R. 12–13). The Supreme Court of North Dakota on appeal heard argument on June 14, 1938 and reargument on July 26, 1939 (R. 19–20). On March 17, 1941, it affirmed the judgment of the District Court (R. 20), with one judge dissenting (R. 39–46).

REASONS FOR GRANTING THE WRIT

The Supreme Court of North Dakota, as we read its opinion, placed its decision upon the following grounds: (1) The activities of the Federal Land Bank of St. Paul, except so far as it serves as a government depositary and as a purchaser of federal bonds, are proprietary not governmental (R. 27–33, 34–36). (2) Congress is without power to provide that the lending functions of the Federal Land Banks should be exempt from state taxation (R. 24–27, 33–34, 36–37). The court announced, as

[2] Owen T. Owen resigned the office of Tax Commissioner on December 26, 1938. A motion to substitute his successor, John Gray, who took office on May 18, 1939, is printed with this petition, *infra*, p. 9.

an alternative ground of its decision, that (3) Congress in Section 26 of the Farm Loan Act (a) was silent as to the liability of the Federal land banks for sales taxes, and (b) must be taken by its silence to have authorized the taxes in question. The first two propositions are in flat contradiction of decisions of this Court and each of the three is a question of first importance.

1. Whatever the case with respect to state activities, we had thought it settled that every constitutional activity of the United States is governmental rather than proprietary. *McCulloch* v. *Maryland*, 4 Wheat. 316, 432; *Van Brocklin* v. *State of Tennessee*, 117 U. S. 151, 158–159; *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466, 477; *Pittman* v. *Home Owners' Corp.*, 308 U. S. 21, 32; *Reconstruction Finance Corporation* v. *J. G. Menihan Corp.*, No. 200, this Term, decided February 3, 1941. The contrary ruling of the court below is in patent conflict with these decisions.

2. So, too, it has been settled beyond doubt that Congress has power to prescribe immunity from state taxation "to protect the lawful activities of its agencies." *Pittman* v. *Home Owners' Corp.*, 308 U. S. 21, 33; *Smith* v. *Kansas City Title Co.*, 255 U. S. 180, 207. The ultimate question in any claim for tax immunity by a federal instrumentality is the intention of Congress. *Helvering* v. *Gerhardt*, 304 U. S. 405, 411–412; *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466, 478–480. The contrary decision of the court below is plainly erroneous.

3. The alternative ground of the court below presents a question of major importance which has not yet been decided by this Court. Section 26 of the Federal Farm Loan Act, *infra*, provides:

> * * * every Federal land bank * * *, including the capital and reserve or surplus therein, and the income derived therefrom, shall be exempt from Federal, State, municipal, and local taxation, except taxes upon real estate held * * * by said bank * * *.

The court below ruled that Section 26 did not include a sales tax within its provisions fixing either exemption from or liability for taxation. But it held, since Congress must have contemplated that the Federal Land Banks would purchase materials, that its failure to prescribe immunity must imply taxability. Contrary inferences are, however, more reasonably to be drawn from Section 26: (a) Section 26 is not silent. The North Dakota sales tax is imposed on the buyer (R. 23); *Jewel Tea Co.* v. *State Tax Commissioner*, 293 N. W. 386, 389, 391. Section 26 exempts "every federal land bank" and would seem therefore to immunize the petitioner from taxes imposed upon it. (b) Even if Section 26 were considered not in terms to deal with sales taxes, the specific exception of real estate, cutting off so narrow a field from the general exemption of capital, surplus and income, implies that taxes falling within neither enumeration are not to be imposed.

Many statutes creating government corporations which have been enacted since the Federal Farm Loan Act have followed the general pattern of Section 26 in dealing with tax exemption.[3] Whether they are exempt from or liable to state sales taxes is a question which has frequently recurred and should be considered by this Court.

4. This case may also present for decision the extent to which a state sales tax may be applied to the transactions of the United States. See *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218; *Graves* v. *Texas Co.*, 298 U. S. 393; cf. *James* v. *Dravo Contracting Co.*, 302 U. S. 134. (a) If respondents should urge, and if this Court should agree, that a sales tax is valid even when imposed upon the United States itself, it might be that Section 26 was intended to confer no greater immunity upon the Federal Land Banks. (b) If the Court should agree with the Supreme Court of North Dakota that Congress in Section 26 was silent as to sales

[3] Federal Reserve Act, c. 6, Sec. 7, 38 Stat. 251, 258; Federal Farm Loan Act, c. 245, Sec. 26, 39 Stat. 360, 380; Reconstruction Finance Corporation Act, c. 8, Sec. 610, 47 Stat. 5; Federal Home Loan Bank Act, c. 522, Sec. 13, 47 Stat. 725, 735, as amended by Act of May 28, 1935, c. 150, Sec. 8, 49 Stat. 293, 295; Act creating Federal Deposit Insurance Corporation, c. 89, Sec. 8 (Sec. 12B (p)), 48 Stat. 162, 177, as amended by Section 101 of the Banking Act of 1935, c. 614, 49 Stat. 684, 696, 700; Farm Credit Act of 1933, creating the Central Bank for Cooperatives, the Production Credit Corporation, Production Credit Associations, and Banks for Cooperatives, c. 98, Sec. 63, 48 Stat. 257, 267; National Housing Act, c. 847, Sec. 402, 48 Stat. 1246, 1256.

taxes, we think that the federal instrumentality is in that case intended to have the immunity which attaches to the operation of the United States.[4] The question is one which should definitely be settled.

CONCLUSION

The decision below raises a number of highly important questions which should be considered by this Court. It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

FRANCIS BIDDLE,
Solicitor General.

MAY, 1941.

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[4] In *Reconstruction Finance Corporation* v. *J. G. Menihan Corp.*, No. 200, this Term, decided February 3, 1941, the Court rejected an analogous argument as to the incidents of suit, but it did so because of the implications of the unqualified "sue-and-be-sued clause". There is no corresponding tax clause in the Federal Farm Loan Act, or in the other statutes cited in note 3, *supra*.

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MOTION TO SUBSTITUTE JOHN GRAY AS TAX COMMISSIONER OF THE STATE OF NORTH DAKOTA

Owen T. Owen, then Tax Commissioner of the State of North Dakota, was joined as a party defendant to this case (R. 3, 10). We are advised that he resigned from this office on December 26, 1938, and that John Gray was appointed his successor on May 18, 1939, and continues to hold this office. The Attorney General of North Dakota has advised us that he consents to this substitution.

The Solicitor General therefore moves, if this Court should grant the petition for a writ of certiorari submitted herewith, that John Gray be substituted as the respondent Tax Commissioner of the State of North Dakota in place of Owen T. Owen.

FRANCIS BIDDLE,
Solicitor General.

MAY 1941

APPENDIX

Federal Farm Loan Act of July 17, 1916 (c. 245, 39 Stat. 360; 12 U. S. C. Sec. 931):

SEC. 26. That every Federal land bank and every national farm loan association, including the capital and reserve or surplus therein and the income derived therefrom, shall be exempt from Federal, State, municipal, and local taxation, except taxes upon real estate held, purchased, or taken by said bank or association under the provisions of section eleven and section thirteen of this Act. First mortgages executed to Federal land banks, or to joint stock land banks, and farm loan bonds issued under the provisions of this Act, shall be deemed and held to be instrumentalities of the Government of the United States, and as such they and the income derived therefrom shall be exempt from Federal, State, municipal, and local taxation.

Nothing herein shall prevent the shares in any joint stock land bank from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the bank is located; but such assessment and taxation shall be in manner and subject to the conditions and limitations contained in section fifty-two hundred and nineteen of the Revised Statutes with reference to the shares of national banking associations.

Nothing herein shall be construed to exempt the real property of Federal and joint stock land banks and national farm loan associations from either State, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed.

North Dakota Laws of 1937, c. 249:

§ 1. DEFINITIONS. The following words, terms and phrases, when used in this Act, have the meanings ascribed to them in this Section, except where the context clearly indicated a different meaning:

(a) "Person" includes any individual, firm, co-partnership, joint adventure, association, corporation, the State of North Dakota and any of its sub-divisions, departments or institutions, any County, City, Village, Township, School District, Park District, Municipal Corporation, estate, trust, business trust, receiver, or any other group or combination acting as a unit, and the plural as well as the singular number.

* * * * *

(d) "Business" includes any activity engaged in by any person or caused to be engaged in by him with the object of gain, benefit, or advantage, either direct or indirect.

* * * * *

(g) "Relief agency" means the State, any County, City and County, City or District thereof, or any agency engaged in actual relief work.

* * * * *

§ 2. TAX IMPOSED. There is hereby imposed, beginning the first day of May, 1937, and ending June 30th, 1939,[1] a tax of two per

[1] Laws of 1939, c. 234, Sec. 1, amends Section 2 of the 1937 Act to extend the tax through June 30, 1941.

cent (2%) upon the gross receipts from all sales of tangible personal property, consisting of goods, wares, or merchandise, except as otherwise provided in this Act, sold at retail in the State of North Dakota to consumers or users; a like rate of tax upon the gross receipts from the sales, furnishing or service of steam, gas, electricity, water and communication service, including the gross receipts from such sales by any municipal corporation furnishing steam, gas, electricity, water and communication service to the public in its proprietary capacity, except as otherwise provided in this Act, when sold at retail in the State of North Dakota to consumers or users; and a like rate of tax upon the gross receipts from all sales of tickets or admissions to places of amusement and athletic events, except as otherwise provided in this Act.

The tax herein levied shall be computed and collected as hereinafter provided.

§ 3. EXEMPTIONS. There are hereby specifically exempted from the provisions of this Act and from computation of the amount of tax imposed by it, the following:

(a) The gross receipts from sales of tangible personal property which this State is prohibited from taxing under the Constitution or laws of the United States or under the Constitution of this State.

* * * * *

§ 5. CREDIT TO RELIEF AGENCY AND LOCAL GOVERNMENTAL UNITS.

(1) A relief agency may apply to the Commissioner for refund of the amount of tax imposed hereunder and paid upon sales to it of any goods, wares, or merchandise

used for free distribution to the poor and needy;

* * * * *

§ 6. Retailers shall add the tax imposed under this Act, or the average equivalent thereof, to the sales price or charge and when added such taxes shall constitute a part of such price or charge, shall be a debt from consumer or user to retailer until paid, and shall be recoverable at law in the same manner as other debts.

Agreements between competing retailers, or the adoption of appropriate rules and regulations by organizations or associations of retailers to provide uniform methods for adding such tax or the average equivalent thereof, and which do not involve price fixing agreements otherwise unlawful, and which shall first have the approval of the Commissioner, are expressly authorized and shall be held not to be in violation of any anti-trust laws of this State.

§ 7. UNLAWFUL ACTS. It shall be unlawful for any retailer to advertise or hold out or state to the public or to any consumer, directly or indirectly, that the tax or any part thereof imposed by this Act will be assumed or absorbed by the retailer or that it will not be considered as an element in the price to the consumer, or if added, that it or any part thereof will be refunded.

* * * * *

§ 10. PAYMENT OF TAX. BOND. CREATION OF LIEN.

(1) The tax levied hereunder shall be due and payable in quarterly installments on or before the 20th day of the month next succeeding each quarterly period, the first of such period being the period commencing

with May 1, 1937, and ending on the 30th day of June, 1937.

(2) Every retailer, at the time of making the return required hereunder, shall compute and pay to the Commissioner the tax due for the preceding period.

U. S. GOVERNMENT PRINTING OFFICE 1941